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Office of Administrative Law Judges
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Issue Date: 22 July 2004

In the Matter of

CONNIE KIM
Claimant

Case No.: 2003 LHC 915
OWCP No.: 15-46417

v.

NAVY EXCHANGE SERVICE
COMMAND/ CRAWFORD &
COMPANY
Employer/Carrier

and

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS
Party in Interest

Appearances: Mr. Jay Lawrence Friedheim, Attorney
For the Claimant

Mr. William N. Brooks, II, Attorney
For the Employer

Before: Richard T. Stansell-Gamm
Administrative Law Judge

**DECISION AND ORDER -
AWARD OF TEMPORARY TOTAL DISABILITY COMPENSATION
AWARD OF MEDICAL BENEFITS
DENIAL OF PERMANENT PARTIAL DISABILITY COMPENSATION**

This case involves a claim filed by Ms. Connie Kim for disability compensation and medical benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 to 950, as amended ("Act"), and as made applicable by the Non-Appropriated Fund Instrumentalities Act, 5 U.S.C. §§ 8171 to 8173.

On January 15, 2003, through counsel, Ms. Kim filed a pre-hearing statement seeking disability compensation and medical benefits for a fractured left ankle injury she suffered on October 11, 2002, while an employee of the Navy Exchange Service Command ("Navy Exchange" and "Employer"). The District Director forwarded the pre-hearing report to the Office of Administrative Law Judges on January 23, 2003. Pursuant to a Notice of Hearing,

dated February 20, 2003 (ALJ I),¹ I conducted a formal hearing on May 16, 2003 in Honolulu, Hawaii, attended by Ms. Kim, Mr. Friedheim, and Mr. Brooks. My decision in this case is based on the testimony presented at the hearing and all the documents admitted into evidence: CX 1 to CX 7 and EX 1 to EX 10.²

Issues

1. Whether Ms. Kim's October 11, 2002 left ankle injury occurred within the course of her employment with the Navy Exchange.
2. If Ms. Kim's left ankle injury is related to her Navy Exchange employment, the nature and extent of any disability after November 19, 2002.

Parties' Positions

Claimant³

On October 11, 2002, after working as a barber until 9:00 p.m. at the barber shop in the Navy Exchange mall, Ms. Kim fell on a handicap ramp in the mall on her way to the parking lot. Ms. Kim was still on the employer's premises when she fell because, even though she was outside the barber shop, the mall contains many separate stores and common areas, all of which comprise the employer's premises.

After Ms. Kim fell, she went home but realized later that night she was seriously injured. In the morning, she sought medical attention. After it was determined that her left ankle was broken, Ms. Kim had a cast on her ankle for five weeks and was not able to work at the Navy Exchange mall or her second job at the Schofield Barracks (a U.S. Army facility) barber shop during that period. Although Ms. Kim returned to full-time work, she was still in pain. Eventually, due to the continued pain, she arranged to cut back her work hours to 20 hours per week over the course of three days. She went back to the doctor who told her to "go light" and concurred in reducing her work schedule.

Although the Navy Region (U.S. Navy) owns the property on which the Navy Exchange mall is located, the Navy Exchange controls the premises in and around the mall. The Navy Exchange also directs employee parking to certain areas by issuing parking decals and monitors the lots by policing them. The Navy Exchange is responsible for certain repairs, which includes ensuring adequate lighting along the pathways surrounding the mall. The Navy Exchange also

¹The following notations appear in this decision to identify specific evidence and other documents: ALJ – Administrative Law Judge exhibit, CX – Claimant exhibit, EX – Employer exhibit, and TR – Transcript of hearing.

²In EX 9, page 39 has been withdrawn.

³TR, pages 6 to 13, 18 to 21 and 105 to 108, and closing brief, dated October 21, 2003. In September 2003, Mr. Brooks objected to Mr. Friedheim's request for an extension of time in which to file his closing brief. Although Mr. Brooks' concerns were not unreasonable, I found them insufficient to preclude my consideration of the counsel's brief.

approves the presence of vendors in the mall area where Ms. Kim fell and keeps the area tidy with its janitorial staff.

Under section 3(a) of the LHWCA, with regard to claims covered under the Non-Appropriated Funds Instrumentality Act, when a parking lot is separate and distinct property, it is not subject to the Act; however, in this case because Ms. Kim slipped before reaching the parking lot, while still on the grounds of the mall and because her employer was responsible for the upkeep of that area, her injuries are covered by the Act. Furthermore, based on case law, the coming and going rule does not apply. Even though Ms. Kim had clocked out from work, she was still on the employer's premises within a reasonable time after leaving work and the area where she fell was "maintained" by the employer. Ms. Kim seeks total temporary disability compensation for the five week period she was in a cast, temporary partial disability compensation for her reduced work schedule and payment of her medical bills.

Employer⁴

Ms. Kim's injury did not arise out of and in the course of her employment due to the application of the "coming and going" rule. Specifically, because Ms. Kim suffered her injury on her way home from work, after clocking out of her job as a Navy Exchange barber, the rule precludes coverage under the Act for her injury.

Further, none of the numerous exceptions to the "coming and going" rule are applicable to Ms. Kim's injury. Ms. Kim was not being transported by her Employer. On the contrary, although the Employer provided shuttle service to the employee lot, Ms. Kim chose to park in a closer lot, alleviating her need to use the shuttle. Ms. Kim was not on the Employer's premises at the time of the injury because the Navy Region, and not the Navy Exchange, owned the property on which she fell. Ms. Kim did not park in an employee-designated lot. Instead, she chose to park in the area that was not exclusively established for Navy Exchange employees or under the Employer's control. As a result, she shared the same risk as the public, rather than a risk of employment created by the Employer. The Employer did not direct Ms. Kim's path to her car and its control over the area where Ms. Kim fell was so minimal that it cannot be deemed to be in control openly or implicitly. Consequently, her disability compensation and medical benefits claim should be denied.

If Ms. Kim's injury is determined to have arisen out of and during the course of her employment, her temporary total disability compensation is limited to \$1,636.54, which represents the amount of the stipulated average weekly rate of \$440.64 and corresponding compensation rate of \$293.76 for a period of 5.571 weeks from October 12, 2002 through November 19, 2002. Ms. Kim should not be compensated for the period of time when she reduced her work schedule due to pain beginning in February 2003 because it was not certified by a doctor until April 8, 2003. Furthermore, on November 11, 2002, Dr. Smith noted that Ms. Kim's left ankle was clinically healed, released her to full-duty work, and told her to return in two weeks. Ms. Kim did not keep the subsequent appointment. Under these circumstances, she reached maximum medical improvement at least by two weeks beyond November 11, 2002. Additionally, Ms. Kim has failed to prove her residual earning capacity after February 2003.

⁴TR, pages 13, 14, 21, 22, 76 to 78, and closing brief, dated September 5, 2003.

Although she reduced her hours at the Navy Exchange barber shop, her testimony indicates the potential for an increase in her earnings with other employers. Absent a showing of residual earning capacity, the extent of any temporary partial disability can not be determined.

Finally, Ms. Kim's testimony that she reduced her work hours due to pain, rather than for other economic reasons, is subject to questioning. Ms. Kim worked full-time for three months before reducing her work schedule. She did not go to her doctor for concurrence with that decision until April 8, 2003, the day after her deposition was taken in this matter. Ms. Kim also acknowledged that she did not reduce any of her other employment due to pain because she needed that money. Therefore, Ms. Kim is not entitled to an award of temporary partial disability benefits even if she is found to have sustained a compensable injury.

SUMMARY OF EVIDENCE

While I have read and considered all the evidence presented, I will only summarize below the information potentially relevant in addressing the issues.

Ms. Connie Kim

Deposition – April 7, 2003 (EX 10)

Ms. Kim first started working for the Navy Exchange in October 1992. She is presently a part-time barber at the Navy Exchange mall on Pearl Harbor. On the day shift, Ms. Kim works on a commission basis from 10:00 a.m. to 5:30 p.m. on Friday and Saturday and till 4:30 p.m. on Monday. She is on her feet most of the day. Since August of 2002, Ms. Kim has also worked as a private contract barber (self-employed) on Sundays, from 10:00 a.m. to 7:00 p.m., at Schofield Barracks. Ms. Kim had also just returned from Hilo where she spent a week working as a barber. In the middle part of February 2003, Ms. Kim went from full-time to part-time at the Navy Exchange due to pain in her left ankle.

The barber shop is located in the mall just outside the main Navy Exchange building, across from its entrance. The mall contains other stores, including a dry cleaners and a florist shop. Navy Exchange employees clean the mall area.

On October 11, 2002, Ms. Kim was leaving work at 9:00 in the evening. She clocked out and headed to the parking lot. Due to construction of the new Navy Exchange, she had to park on the far side of the lot, near a church. The former employee parking area was being used for customer parking and the employees could not park there anymore. It was "kinda dark" and it had rained. While on a ramp leading to the parking lot but still on the mall grounds, Ms. Kim slipped and fell, twisting her ankle as her body landed on her left foot. At first, she was embarrassed because she couldn't get up. Eventually, some customers helped Ms. Kim to get up from the ground. She limped to her car and drove home. Because she was in a lot of pain and her ankle swelled over night, she went to the doctor the next morning. At the doctor's office, she called her supervisor to inform him of what happened the day before and that she would not be able to attend work that day. A few days later, her supervisor told Ms. Kim that a lot of people

had gotten hurt on that ramp since it had been changed. Ms. Kim later filled out an accident report with the security office at the Navy Exchange after she was asked to complete the paper work.

The morning after the accident, Dr. Suh took an x-ray of Ms. Kim's left ankle and determined that it was broken. He referred her to another physician, Dr. Sowers, for treatment. Dr. Sowers concurred that the ankle was broken and wrapped it with a bandage until the swelling lessened and a cast could be put on it. Ms. Kim asked Dr. Suh for a different physician recommendation because Dr. Sowers did not honor her insurance plan. Ms. Kim then visited Dr. Sydney Smith, a specialist in orthopedics. He put a cast on Ms. Kim's ankle, which remained for three to five weeks; Ms. Kim could not recall exactly how long it was in place. Her last visit to the doctor occurred when she got the cast removed. Recently, Ms. Kim made an appointment to see Dr. Smith the day after this deposition took place (April 8, 2003). She had not gone back to the doctor earlier because she believed the pain was normal for a broken bone. Yet, because the pain lingered, she made an appointment.

When Dr. Smith removed the cast after five weeks, he also released Ms. Kim to work full duty with no restrictions a few days after the visit. She asked him about the pain and the physician indicated that was normal and the pain situation would improve. So, Ms. Kim went back to work full-time. However, eventually because she was still in pain, Ms. Kim asked her supervisor if she could reduce her work hours. In February 2003, she began working 20 hours over the course of three days per week with her supervisor's approval. Despite her reduced hours, use of an ace bandage on occasion, supportive shoes, and chair positioned closer to the customers, the ankle pain continued. The physical requirements of a barber include standing most of the time. Ms. Kim also worked at a second job one day a week at the Schofield Barracks. She was not able to work that job either during the period which she had a cast.

Ms. Kim had been diagnosed with osteoporosis three to four years earlier when she suffered a wrist injury as a result of a fall at home. She is no longer able to hike, rollerblade or run. She continues to exercise by taking one hour walks three times per week.

Ms. Kim's present left ankle pain is not sharp; it just hurts several times a day, especially when she gets up in the morning. Although there is no swelling, the left ankle is bigger than the right ankle. Over the last 30 days, the pain has worsened. When she is on her feet at work, the symptoms are worse. After work, her left ankle is more painful. Prior to the accident, Ms. Kim did not have any problems with her ankles. Reducing her work to 20 hours a week has helped her ankle.

Ms. Kim believes the area where she fell was cleaned by Navy Exchange employees. When problems occurred around the mall, such as improper lighting, Ms. Kim would call Navy Exchange security. The route she took to her car was the normal way to get into the parking lot. The ramp where she fell was still part of the shopping center. Ms. Kim fell less than a two minute walk from the barber shop. When employees work the late shift, they try to park closer because at 9:00 p.m. "it's dangerous to walk too far" and all the customers have gone. Customers that parked in the lot would take the same path to get to the parking lot from the mall. Originally, the lot was only for the use of Navy Exchange employees but during construction,

which had commenced some time before the accident, they removed the employee parking signs and customers were permitted to use the lot. Employees were then limited to parking only in the furthest area of the lot.

Ms. Kim still has a couple of pending medical bills; one from Dr. Suh's treatment is in the amount of \$275. She is not sure if the bills have been submitted to her health insurer.

At the Schofield Barracks, she charges \$6.75 for a haircut. On a slow day, she does about 40 haircuts (\$270) and keeps 65% (\$175.50). On a busy day, the number of haircuts is 65, (\$438.75) and she takes home 65% (\$285).

Hearing Testimony – May 16, 2003
(TR, pages 22 to 76)

[Direct Examination] Born in Tokyo, Japan, Ms. Kim graduated from beauty school and university there and went to work as a beautician. On October 20, 1992, Ms. Kim began working part-time as a barber for the Navy Exchange at the Navy Exchange mall located at Pearl Harbor. Two months later, in December 1992, Ms. Kim's employment became full-time, working five days a week for 40 hours per week. She is paid by a 47.4 percent commission. She clocks in and out of work, but that has nothing to do with her pay which is strict commission. As a barber, Ms. Kim stands all day. In mid-February 2003, due to pain in her left ankle from the accident, she cut her hours in half, to 20 hours over three days. She had waited for the ankle to heal but it "was getting worse and worse."

Ms. Kim keeps her barber tools, such as scissors, combs, and clippers, in her car. On occasions, if she forgets a tool, Ms. Kim will return to her car during the regular work hours to retrieve the item.

The Navy Exchange mall has several stores besides the barber shop. The area has a florist, dry cleaners, optical shop, ice cream shop, "video place," and a frame shop. All the employees in these facilities work for the Navy Exchange. The area also has a food service area with tables where employees can eat and drink. Since employees are not permitted to eat or drink in the barber shop, Ms. Kim would usually take her breaks in the food service area of the mall. Sometimes, she goes to other areas of the mall. There is also a smoking area.

Ms. Kim has observed Navy Exchange employees cleaning the mall area. She recognized the individuals as Navy Exchange employees because she cuts their hair. Additionally, the Navy Exchange occasionally conducted meetings with its employees, which Ms. Kim attended. At these gatherings, Ms. Kim saw the same individuals who had cleaned the mall area, replaced light bulbs in the mall area, and maintained the mall area.

For most of her employment, Ms. Kim parked her car in a designated employee parking area. However, during a recent two year construction project to build a new Navy Exchange mall, the designated employee parking area was changed to customer parking. By verbal and written notice, the Navy Exchange employees were informed they could no longer park in area formerly designated for them. The employees were warned that if they parked in the customer

parking area, their cars, which were identified by stickers, would be towed. So, the employees had to find parking at other locations.

After the store closed at 9:00 p.m. on October 11, 2002, Ms. Kim was walking from the barber shop to the parking lot with a co-worker to get her car, which she drives to work. She slipped and fell on the concourse leading from the mall to the parking lot. The picture at EX 8, "page 16," depicts the location of her fall. She was still in the white area (concrete) on the ramp when she fell. The dark area (asphalt) is the sidewalk leading to the parking area.

After her fall, Ms. Kim refused help from onlookers, walked to her car and drove home. Although her ankle hurt, the slip had been "casual" so Ms. Kim believed that she had only strained her ankle. During the night, she began experiencing more serious pain and her ankle swelled. The following day, instead of reporting to work, Ms. Kim went to see her doctor, Dr. Phillip Suh, who x-rayed her ankle and informed her that it was broken. She called her employer from the doctor's office and indicated she would not be at work due to her injury. She believes the physician also faxed some information to the Navy Exchange. Dr. Suh sent Ms. Kim to Dr. Sowers, who also informed her that her ankle was broken and put on a temporary cast. However, Ms. Kim went to Dr. Sydney Smith for treatment because he specializes in orthopedics and was covered by her insurance plan. Dr. Smith put a cast on Ms. Kim's left ankle and informed her that the injury might take extra time to heal because of her osteoporosis condition. After she had the cast, Ms. Kim went to the Navy Exchange mall and filled out an accident report with security personnel.

The cast remained on her ankle for five weeks and she did not attend work at the Navy Exchange.

Ms. Kim is also self-employed as a barber at Schofield Barracks. In that work, she keeps 65 percent of what she charges and leaves 35 percent to the facility. Based on that arrangement, Ms. Kim earns about \$150 a day and pays self-employment taxes. One tax document, EX 10 "page 113," indicates that in the second half of 2002, through December 31, 2002, she earned \$2,746.70 in this second job. During this reporting period, she did not work five weeks when she was in a cast due to her broken ankle and three weeks when she went on vacation to Korea.

At the end of the five-week recovery period, in November 2002, Dr. Smith removed the cast and told her to expect some pain. According to the physician, by nature, the pain would go away and she could use the ankle. However, the ankle would never be the same. So, Ms. Kim returned to work full time at 40 hours a week but still suffered a lot of pain. The barber shop leader gave her the chair nearest the customers so she wouldn't have to walk so far to get her customers. Ms. Kim expected the pain to go away, but it kept bothering her and in mid-February, she cut her hours in half, recalling that the doctor had told her to "go light." As the barber shop leader was making the schedule, Ms. Kim told her that her ankle hurt too much to be on her feet all day. At that time, Ms. Kim reduced her hours at the Navy Exchange to 20 per week over three days.

Since the pain continued, Ms. Kim returned to Dr. Smith in April 2003. When she told him that she had cut back her hours to 20 and her ankle was feeling a little better. He responded, "Good . . . okay, half-duty." He also advised her to take pain medication if the pain was bad.

[Cross examination] At the time Dr. Smith removed her cast, Ms. Kim does not remember whether she told him that she could stand without pain. After the cast was removed, he released her to work full-time, without restrictions in about a week. Though Dr. Smith expected her to return in a few weeks to check on her progress, she did not go back at that time because he said the pain would continue for a while. The doctor told her to come back if the pain was real bad. Though she had pain, Ms. Kim did not return because she is not a complainer. She waited until April 8, 2003 to revisit the physician because she expected to be in some pain based on the doctor's earlier orders. Coincidentally, her doctor visit took place the day after her deposition.

After the cast was removed, Ms. Kim worked full time for three months both at the Navy Exchange and Schofield Barracks. She declined an offer of early retirement from the Navy Exchange because she would lose her medical benefits. In mid-February, she cut back her work only at the Navy Exchange. She did not cut back her time at Schofield Barracks because she earns \$150 in the one day. She does not make that kind of money at the Navy Exchange. Since she needed to continue earning a decent living, she chose the Navy Exchange to cut back her time rather than Schofield Barracks. Sometimes, she goes to other islands for a few weeks to work as a barber. When she makes those trips, she has to take leave from the Navy Exchange. When she told her supervisor at the Navy Exchange that she could make money on the other islands, she said "Go for it" and approved the extended leaves. Ms. Kim continues to make those trips whenever she can. In April 2003, she took five days off and went to the Big Island (Island of Hawaii) and worked four days while she stayed on the base. "It's better money."

Due to the large number of barbers at the Navy Exchange, they have to take turns with customers, so there is a lot of "down time." The last two days she worked there, Ms. Kim made only \$40 a day. After taxes, "there's no money." Consequently, even though her ankle hurts, Ms. Kim continues to work to make a living. In her regular schedule, Ms. Kim works Monday, Friday, and Saturday at the Navy Exchange and Sunday at Schofield Barracks. On the days off from the Navy Exchange she does not work any other job.

The ramp pictured in EX 8, "page 17," with the ridges is where she fell. As she was coming from the mall area and started down the ramp, her left foot slipped and her body fell on her left ankle on the ramp. For a while, she just sat there and declined assistance; eventually, she accepted help from a customer.

The parking lot depicted on the left side of the picture marked EX 8, "page 22" was the employee parking area before the construction began. She used to park her car there and used the ramp to walk to the barber shop. After construction started, the parking area was reserved for customers; employees could no longer park there. Instead, she parked further out in the lot. However, she still took the same route up the ramp to the barber shop. During construction, the designated employee parking area was located far away from the store and a shuttle bus provided transportation. During the day, that arrangement worked okay. However, at night the shuttle bus

would come late. So, she would park her car in the closer lot. Customers used the same ramp. On the night she fell, Ms. Kim clocked out, left the barber shop and noticed it had been raining and the area was wet; so, she was trying to walk carefully. As an employee, Ms. Kim is authorized to shop in the Navy Exchange.

Ms. Kim is uncertain whether the workers in the food court in the mall area are Navy Exchange employees. The employees who work in the main store have their own entrance. But, Ms. Kim went from the parking area “straight to the barber shop.” The barber shop had its own employee clock to make sure the barbers worked the entire shift.

The route Ms. Kim was walking when she fell was the same path she used to travel to the old employee parking lot before construction began. Ms. Kim had not parked in the designated employee lot, which required a shuttle bus ride that ran every 8 to 12 minutes because she preferred not to take the shuttle after dark. Instead, she parked towards the back of the customer lot. When she fell, she was traveling along the same path that she would have taken to the shuttle bus stop had she parked in the remote designated employee lot.

When Ms. Kim left the barber shop at 9:00 p.m., she purposely walked with care because the lighting on the path was dim and it had been raining, wetting the ground.

Mr. Conrad Spence – Hearing Testimony
(TR, pages 78 to 104)

[Direct examination] Mr. Spence has worked for the Navy Exchange for more than five years as the facility maintenance manager. He is responsible for all of the interior maintenance of the store, in addition to some of the exterior and janitorial functions.

The Navy Exchange mall is located on the naval base and is owned by the Navy Region, Hawaii but it is located outside the security gate surrounding the main base. Construction began on a new Navy Exchange mall in January 2001 and continued through September 2002. The Navy Exchange financed the construction but upon completion, ownership of the building was turned over to the Navy Region who then became responsible for its maintenance and repair, leaving the Navy Exchange as only the tenant of the facilities.

The Navy Exchange is a non-appropriated fund instrumentality (NAFI), which means that its funds are self-generated; whereas, the Navy Region is a separate entity and an appropriated fund instrumentality, which means that it receives tax dollars. The Navy Region is the “host” for the Navy Exchange and owns the mall property. The Navy Exchange is the “tenant,” and uses the premises. Mr. Spence, referencing EX 9 (Condensed Appropriated Funding Support Guide and Desk Reference), explained that certain activities cannot be done using non-appropriated funds, including maintenance and repair generally. However, within the main store, the Navy Exchange is responsible for repair of the customer contact areas, including the flooring, lighting and fixtures. Only appropriated funds are to be used for issues relating to the building itself, such as maintenance of the ramp where Ms. Kim fell. If the Navy Region and Navy Exchange concurred that lighting in the area needed to be improved, Navy Region would complete the improvements.

The ramp shown in EX 8 is the handicap access ramp. If there's a structural problem with the ramp, the Navy Region, and not the Navy Exchange, is responsible for the repair. After coming up the ramp, a person has access to the laundry shop, mailing shop, and the other services in the mall. The barber shop is a couple hundred feet from the ramp. If there is a lighting problem in the mall area, the Navy Region is responsible for providing additional lights.

[ALJ examination] The white area with a canopy or tent in EX 8 is the thoroughfare that leads to the Navy Exchange building. Along that thoroughfare to both the left and right are several shops, with dry cleaning on the left side and the flower shop on the right side. The barber shop is located further on down the mall. Outdoor vendors may also be present in the mall area. That type of vendor must get permission from the Navy Exchange management or operations department to set up in the mall area. Occasionally, the Navy Exchange conducts sales in the mall area. The Navy Exchange referred to that area as the outside covered lanai. Just past the tented area, continuing into the mall, is a sign that says, "Welcome to Navy Exchange." The barber shop was 35 to 40 feet from that sign. Even though the host unit, the Navy Region, is probably responsible for maintaining the mall area, the Navy Exchange janitorial employees keep the area clean. In other words, although the contract fixes various responsibilities, in the "real world" the Navy Exchange store manager would ensure the area is picked up.

[Re-direct Examination] The parking lot in the picture in EX 8 used to be the employee designated parking area. When construction started, 300 parking spaces were lost, so "we turned that [area] over to customer parking and then we went out and got another area for our employee parking." A shuttle carried employees to and from the new employee parking lot; it ran every eight to twelve minutes. Employees at the Navy Exchange could be picked up from two different locations that were equidistant from the barber shop, about 300 to 400 feet.

[Re-cross examination] The Navy Exchange provided the shuttle for its employees to get to the new employee parking lot. The bus is operated by a Navy Exchange employee. Ms. Kim fell on a thoroughfare leading to one of the shuttle stops, about 100 feet from the barber shop and about 150 feet from the shuttle pick-up point. Beyond the newly designated customer parking area, anybody could park in the other areas. Mr. Spence is not sure whether Navy Exchange employees were supposed to do that.

When asked, "The whole general area is referred to as the Navy Exchange Mall, isn't it?" Mr. Spence answered, "Yes, it is." In answer to the follow-on query, "And that's all Navy Exchange activities going on in this mall, correct?" he stated, "That's correct." Though the outside vendors were not Navy Exchange employees, they could not set up in the mall area without Navy Exchange permission. Navy Exchange employees regularly and customarily picked up garbage and cleaned up spills around the mall. Mr. Spence's janitorial staff accomplished those tasks. They were responsible for the general cleanliness of the mall area. After periods of heavy rain, they would also remove large puddles of standing water with squeegees. Because the ramp is sloped, it would not have to be squeegeed.

Compensation Claim
(CX 1 and EX 1)

On October 27, 2002, Ms. Kim submitted a claim for compensation due to an injury to her left ankle from the October 11, 2002 accident. Ms. Kim fractured her left ankle when she slipped and fell on the wet surface of a Navy Exchange mall wheelchair ramp in the dark after she punched out from work and was leaving the premises to go to the parking lot.

Notice of Controversion
(CX 1 and EX 3)

On November 10, 2002, the Navy Exchange controverted Ms. Kim's right to compensation because of the questionable course and scope of employment and the questionable causal connection.

Income Tax and Sick Leave Documents⁵
(CX 2 and CX 6)

In her 2001 federal income tax return, Ms. Kim reported earning \$27,160. Her Navy Exchange W-2 for the same year showed a total income of \$20,975. That income included her commissions and a 7.5% pay differential for the second shift. On her 2002 federal tax report, Ms. Kim reported earnings of \$19,796. A biweekly Navy Exchange pay summary, for the period October 23 to November 6, 2002, indicates Ms. Kim took 11.23 hours of sick leave at the hourly rate of \$14.63. Her sick leave balance was "0.57." The stub for the next pay period, November 6, 2002 to November 19, 2002, shows 8 hours of holiday leave at the rate of \$14.63. Her sick leave balance was "0.97." As of November 19, 2002, the year-to-date earnings total was \$18,270.82.

Dr. Phillip Suh – Treatment Notes & Correspondence
(CX 5, EX 4, and EX 10 (attachments))

On October 12, 2002, Ms. Kim presented to Dr. Suh, her family physician, with an ankle fracture, which she received when she "slipped and fell in the parking lot" leaving work the day before her visit. Ms. Kim's ankle was swollen, painful, and tender; she had difficulty walking. Her medical history included osteoporosis. Dr. Suh diagnosed left ankle fracture and sent Ms. Kim to Dr. Sydney Smith, an orthopedist. He requested a follow-up visit in two weeks. On the same day, Dr. Suh also certified that Ms. Kim was under his care for an ankle fracture and was incapacitated from October 12, 2002 through October 28, 2002 and would be able to return to her regular assigned duties on October 29, 2002.

On November 26, 2002, Dr. Suh followed up Ms. Kim's treatment from her left ankle fracture received on October 11, 2002, for which she was referred to Dr. Smith. The x-ray that was taken on October 12, 2002 confirmed the fracture of Ms. Kim's left ankle. The physician diagnosed left ankle fracture, prescribed medication, and indicated his plan was patient education. He requested a follow-up appointment two weeks later.

⁵See also EX 5 for a more detailed wage summary.

Dr. Sydney Smith - Treatment Notes & Correspondence
(CX 3, CX 7, and EX 4)

On October 29, 2002, Dr. Sydney Smith certified that Ms. Kim was under his care and totally incapacitated from October 29, 2002 through November 12, 2002 due to a left ankle fracture.

On November 11, 2002, Ms. Kim presented to Dr. Smith, about one month after her left ankle injury. The physician indicated that Ms. Kim was “doing well in the boot and has been weightbearing without pain.” Dr. Smith found minimal swelling of Ms. Kim’s left ankle, good range of motion and some calf atrophy. He also noted that she was non-tender over the distal fibula and had no instability. Follow-up x-rays showed that the fracture was healing. Dr. Smith concluded that the distal fibular fracture of Ms. Kim’s left ankle was clinically healed. Dr. Smith recommended that Ms. Kim return to work the next week, discontinue the use of the boot at that time, and follow up with him in a few weeks.

On November 11, 2002, Dr. Sydney Smith also certified that Ms. Kim was under his care and totally incapacitated from November 11, 2002 to November 19, 2002. He stated that Ms. Kim could return to work on November 20, 2002 at full duty with no restrictions.

In a note, dated November 11, 2002, Dr. Smith approved Ms. Kim’s return to work on November 20, 2002 full-duty with no restrictions. Dr. Smith also endorsed Ms. Kim’s application for sick leave indicating her serious health condition was a) non-weight bearing from October 11, 2002 to October 21, 2002; b) full weight bearing with continued pain from October 21, 2002 to November 11, 2002; and, c) off work from October 11, 2002 to November 19, 2002.

In another note, dated April 8, 2003, Dr. Smith restricted Ms. Kim’s work to light duty of only three days a week for 20 hours per week.

Navy Exchange Leave Documents
(CX 7)

On November 5, 2002, Ms. Kim submitted an application for donated leave because she broke her ankle and could not work.

On November 6, 2002, Ms. Kim completed an application for leave under Family Medical Leave Act for her own serious health condition. According to Ms. Kim, a broken left ankle would make her unable to perform the functions of her job from October 11, 2002 through December 25, 2002. The form included Dr. Smith’s diagnosis and signature as of November 11, 2002.⁶

⁶Dr. Smith only certified his diagnosis. He did not indicate his concurrence with Ms. Kim’s December 25, 2002 estimate.

Form LS-202 / Employer's First Report of Injury
(EX 2)

On October 31, 2002, Nexcom Risk Management submitted a Form LS-202, reporting that Ms. Kim broke her left ankle, due to an October 11, 2002 accident. Ms. Kim alleged that after she clocked out from the barber shop and was on her way out of the Exchange area, she slipped on the wet sidewalk due to rain. The injury did not occur on the Navy Exchange premises. The Navy Exchange did not authorize medical care.

Retirement Benefits Summary
(EX 6)

A retirement plan annuity estimate based on a retirement date of March 1, 2003 indicated that Ms. Kim had 10 years and four months of credited service. Her VSIP estimate was \$4,973. Averaging her three highest average annual earnings, Ms. Kim could earn a monthly benefit to age 62 of \$311 with survivor annuity and \$346 without survivor annuity. At age 62 and after, Ms. Kim would earn \$209 with survivor annuity and \$233 without survivor annuity. Ms. Kim would be able to take advantage of other employment benefits upon retirement.

Job Description
(EX 7)

The job description for barber indicates the physical effort "requires continual use of both arms and legs which involves frequent standing, reaching and light lifting."

Some of the other duties of a barber include operating the cash register, preparing hair care chits, collecting and accounting for cash received by clients, selling hair care products to clients, opening and closing the shop, and assisting with monthly inventory.

Appropriated Funding Support Guide -- Navy Exchange Service Command
(EX 9)

This document describes the relationship between the Navy Region Hawaii and Navy Exchange regarding ownership and use of the property on which the Navy Exchange mall is located. The host activity is one which provides facilities to the tenant activity. The tenant activity is one which uses facilities and/or receives services from the host activity. [According to Mr. Spence, the Navy Region is properly considered the host, while the tenant activity is the Navy Exchange which uses the facilities.]

The host activity is responsible for costs incurred for the preservation of facilities, including structural maintenance of a cyclical nature and repair to ensure the continued integrity of the building. In addition, the host covers maintenance and operation costs related to facilities used in common by both host and tenant, such as roads and walkways.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Stipulations of Fact

The parties have stipulated to the following facts (TR, pages 13 to 15): On October 11, 2002, Ms. Kim broke her left ankle, requiring her to be off of work from October 12, 2002 through November 19, 2002. At the time of the injury, an employer-employee relationship existed between the parties. The applicable average weekly wage is \$440.64.

Issue # 1 – Coverage of Act

Principles

Since the parties have stipulated that Ms. Kim broke her left ankle on October 11, 2002, the principle issue in this case is whether that injury arose within the course of her employment with the Navy Exchange. To be compensable under the Act, Section 2 (2), 33 U.S.C. § 902(2) requires that an injury arise out of and in the course of a claimant's employment.⁷ This course of employment requirement refers to the time and place (or space) of employment as well as the activity the employee was engaged in at the time of the injury. *Wilson v. Washington Metro Area Transit Auth.*, 16 BRBS 73, 75 (1984).

In regards to the time requirement, an employee is allowed a reasonable time before and after work to enter and exit an employer's premises to still be considered within the ambit of the course of the employee's employment. *See Trimble v. Army and Air Force Exchange Service*, 32 BRBS 239 (1998) (citing 1 A. Larson & Lex R. Larson, LARSON'S WORKMEN'S COMPENSATION LAW §§ 15.00 (1997)). In Ms. Kim's case, she had just clocked out at the barber shop at the closing time of 9:00 p.m. and finished walking through the Navy Exchange mall towards the parking lot when she slipped and fell on the handicap ramp to the concourse. At that time, Ms. Kim had only been out of the barber shop a couple of minutes. As a result, I find she was still within that "reasonable amount of time" window when she fell, and therefore Ms. Kim has satisfied the timing requirement of course of employment standard.

The other two factors in the course of employment standard, place and the activity-employment relationship, are closely related and are the central points in Ms. Kim's injury claim. The activity-employment relationships must be a substantially contributing factor though it need not be the sole or proximate cause of the injury. *Cudahy Packing Co. v. Paramore*, 263 U.S. 418, 423-24 (1923). The place/space criteria is not absolute if the employee's purpose is clearly tied to her employment. *Preskey v. Cargill, Inc.*, 667 F.2d 1031 (9th Cir. 1981) (injury suffered by employee when picking up his pay check at the union hall was compensable). Likewise, if an injury occurs on the employer's premises, and the activity did not place the employee in the path of any new risk not already inherent in her employment, the unauthorized and personal character of the activity's purpose loses significance. *Durrah v. Washington Metro Area Trans. Auth.*, 760 F.2d 322, 324 (D.C. Cir. 1985) (employee suffered a compensable injury at employer-provided

⁷The Section 2(2) analysis is appropriate rather than consideration the Section 20(a) causation presumption at this point because the issue that is contested is whether Ms. Kim's injury was work-related. To invoke the presumption under Section 20(a) of the Act, a claimant must establish the existence of an injury, as defined by the Act, and the occurrence of a work related accident that could have caused the injury.

soda machine on the business premises after leaving his post without permission). At the same time, if the unauthorized personal mission represents “personal frolic” and has no benefit to the Employer, then an injury suffered during that activity may not be compensable. *Compton v. Avondale Industries, Inc.*, 33 BRBS 174 (1989) (employee’s injury suffered after leaving work station to smoke marijuana in remote areas of the premises was not compensable.)

Not surprisingly, in light of these principles, a rule concerning the arrival and departure of employees has evolved, which directly affects Ms. Kim because she was injured after leaving the barber shop but before reaching her car in the parking lot. Generally, according to the “coming and going” rule, an injury an employee suffers on her way to and from work is not covered under Section 2 (2) of the Act. *Perkins v. Marine Terminals*, 673 F.2d 1097, 1102 (9th Cir. 1982) and *Owens v. Family and Home Services, Inc.* 2 BRBS 240 (1975). However, once the employee reaches, or remains on, an employer’s premises, depending on the circumstances, an injury occurring before or after work hours may still be compensable (emphasis added). *Durrah*, 769 F.2d at 324. Thus, the “coming and going” rule is invoked at the threshold of an employer’s premises. Defining this critical legal boundary of an employer’s business, especially in regards to parking lots, has in turn generated significant litigation.⁸

Usually, the employer’s business premises will include an employee parking lot over which the employer exercises significant control, even if it does not actually own the property. *Shivers v. Navy Exchange*, 144 F.3d 322, 325 (4th Cir. 1998). Such authority may be demonstrated if the Employer affirmatively designates an employee parking area, enforces parking rules in the lot, provides upkeep and day-to-day housekeeping maintenance of the area, dictates the means and manner by which its employees arrive and leave their work locations, and exercises sufficient control over a portion of an employee’s journey in the area to create a risk of employment not shared by the public. *Id* at page 325 and footnote, *Cantrell v. Base Restaurant Wright-Patterson Air Force Base*, 22 BRBS 372 (1989), *Trimble v. Army and Air Force Exchange Service*, 32 BRBS 239 (1998), and *Sharib v. Navy Exchange Service*, 32 BRBS 281 (1998). Correspondingly, if the employer lacks control over, or responsibility for, the condition of the area surrounding its building, that area, which may include a parking lot used by its employees, is not part of the business’ premises. *Harris v. England Air Force Base Nonappropriated Fund Fin. Management Branch*, 23 BRBS 175 (1990).

Specific Findings

Having reviewed the applicable legal guidelines, I next move to specific findings concerning the circumstances of Ms. Kim’s October 11, 2002 slip, fall, and corresponding broken left ankle. The Navy Exchange, a nonappropriated fund instrumentality conducts a business on, and in, property owned by the Navy Region. Under an agreement, the Navy Exchange leases its main building premises from the Navy Region. Inside the store, the Navy Exchange is responsible for upkeep and repair of the customer contact areas, including flooring,

⁸Additionally, at least four exceptions to the “coming and going” rule have been established. The rule does not preclude compensation under the Act where: (1) the employee is paid for the trip to and from work; (2) the employer controls the journey; (3) the employee is on a special errand for the employer; or (4) the employee is subject to emergency calls. *Perkins v. Marine Terminals Corp.*, 673 F.2d 1097 (9th Cir. 1982) (citing *Lasky v. Todd Shipyards Corp.*, 8 BRBS 263, 265 (1978)); *Trimble*, 32 BRBS 239. None of these exceptions appear applicable in Ms. Kim’s case.

lighting and fixtures. Conversely, the Navy Region is responsible for maintenance and repair of the outside area surrounding the main building.

At the time of Ms. Kim's accident, October 2002, a partially covered concourse is located adjacent to the main store building leased by the Navy Exchange. Various stores and shops are situated on each side of the concourse, essentially establishing a contiguous mini-mall. The mall area runs parallel to the main building and opens onto a parking lot. This entrance includes a grooved handicap walkway ramp. The various mall shops include a dry cleaners, a florist, a video rental store, an ice cream shop, and a barber shop. The employees in the various establishments work for the Navy Exchange. A food court is also located in the mall area and is used by Navy Exchange employees on their breaks. In addition to the mall stores, other vendors sell merchandise in the concourse area. These outside vendors have to obtain the permission of the Navy Exchange to operate in the mall area. On occasion, the Navy Exchange also conducts sales in the mall area. A banner over the concourse states, "Welcome to Navy Exchange" and the concourse is called the "Navy Exchange Mall." The Navy Exchange employees and janitorial staff keep the mall area clean and replace light bulbs as necessary. Navy Exchange employees also remove standing water from the mall area following heavy rains.

In January 2001, a two year construction project began on a new Navy Exchange store. Prior to construction, Navy Exchange employees parked in a lot specifically designated for employees that was readily accessible from the mall entrance. Due to the construction, the Navy Exchange changed the designated employee parking area into customer parking. After this change, the Navy Exchange directed its employees not to park in the former area or their cars, which are identified by employee decals, would be towed. Some distance from the store, the Navy Exchange provided another location for employee parking, and shuttle transportation to and from the new employee parking lot. The Navy Exchange established two shuttle pick-up points for its employees located a couple hundred feet in either direction from the mall entrance.

On October 11, 2002, Ms. Kim was working as a Navy Exchange employee in the barber shop. Rather than use the designated employee parking area and the shuttle bus, Ms. Kim parked her car in an area of the Navy Exchange parking lot far away from the mall entrance and not in the formerly designated employee parking area. At the close of business, 9:00 p.m., she clocked out in the barber shop, left the shop, and walked a couple of minutes to the mall entrance ramp on the way to her car's location in the parking lot. The ramp was wet because of rain. Ms. Kim slipped on the wet ramp, fell on top of her left foot, and fractured her left ankle.

Discussion

Based on its contractual arrangement with the Navy Region, the Navy Exchange's challenge of the Act's coverage of Ms. Kim's broken ankle injury is understandable. The two "activities" have essentially agreed that the Navy Exchange is responsible for the area inside the main building store and the Navy Region is responsible for the property and area outside that building, which it owns. However, based on the above specific findings, I conclude the Navy Exchange conducted retail operations and exercised significant control far beyond the interiors of its main building store.

In terms of retail operations, the Navy Exchange conducted a wide variety of retail business and services in small shops staffed with its employees on both sides of the adjacent concourse. The Navy Exchange, and not the Navy Region, had the authority to give permission to outside vendors to operate on the mall concourse. The Navy Exchange itself also periodically extended its sales function from the main store into the concourse area. Clearly recognizing the significance of the mall area to its customers, the Navy Exchange, and again not the Navy Region, provided the day-to-day maintenance of the mall area, which included keeping the mall area clean, well lit, and clear of standing water.

In regards to significant control, in addition to having the authority to approve outside vendors and conduct retail operations in the mall and on the concourse, the Navy Exchange had sufficient control over the parking lot to initially have a designated employee area. Then, when construction mandated additional parking for its customers, the Navy Exchange further demonstrated apparent authority over the parking area adjacent to the mall entrance by changing the parking lot designation from employee to customer, restricting its employees from parking in the former location, and threatening to enforce the parking restriction. The Navy Exchange further exercised control over its employees' parking by establishing an alternative employee parking lot, providing shuttle transportation, and defining shuttle pick-up points in the adjacent parking area for the employees. Significantly, through this arrangement, the Navy Exchange effectively dictated the route its employees had to take to catch the shuttle bus for the new designated employee parking. To reach at least one of these Navy Exchange-defined pick-up locations, Navy Exchange employees had to proceed through the concourse, out the mall entrance with the ramp, and along another hundred plus feet.

In light of these factors, despite the Navy Exchange-Navy Region written agreement, the name given to the concourse, "Navy Exchange Mall," and the welcoming banner more accurately reflect the true nature of the concourse and mall area. Based on the considerations noted above, I conclude the preponderance of the evidence establishes that the Navy Exchange's business premises extended well beyond the walls of the main store and included the concourse, the mall area, the mall entrance ramp, and the path to the two designated employee parking shuttle pick-up points. In light of the expanded business boundary of the Navy Exchange on October 11, 2002, Ms. Kim fell and broke her left ankle on its premises.

I have considered that at the time of her fall, Ms. Kim was not attempting to reach one of the specified employee parking lot shuttle pick-up points. However, for three reasons, her decision not to use the designated employee parking lot on October 11, 2002 does not deprive her injury of coverage under the Act. First, though Ms. Kim was going to a location in the adjacent parking lot that was not under the apparent control of the Navy Exchange, she fell before reaching the parking lot. In light of the photos of the ramp in EX 8 and considering the function of the mall entrance (access for customers and employees) and the nature of the ramp's construction (apparently concrete consistent with the concourse walkway, rather than parking lot asphalt), I find the ramp upon which she slipped was an integral part of the concourse and mall area, rather than the parking lot. Second, although Ms. Kim was not on her way to catch the shuttle bus, the route she had taken up to the time of her fall was the same path she would have taken to catch the shuttle bus due to the location of the shuttle pick-up points. In other words, her journey on October 11, 2002 up to the time of her accident exposed Ms. Kim to the same

hazards she and other Navy Exchange employees would have experienced attempting to use the shuttle bus that night after closing. Ms. Kim's parking choice did not place her in the path of a new risk not already inherent in her employment with the Navy Exchange. Third, while Mr. Spence indicated the Navy Exchange did not take care of water on the ramp because it was sloped, I believe the Navy Exchange's maintenance efforts and real-world responsibility reasonably extended to the concourse ramp to ensure it remained clean and unencumbered for its handicapped patrons.

In summary, because the Navy Exchange conducted and authorized retail operations throughout the concourse and mall area and exercised authority and control beyond the perimeters of its main building, I have determined that the handicap ramp at the entrance of the Navy Exchange mall area was part of its business premises. As a result, when Ms. Kim fell on the wet concourse ramp to the Navy Exchange Mall shortly after leaving work as a Navy Exchange employee, her injury occurred on the business premises of the Navy Exchange. Accordingly, due to the timing, location, and circumstances of her fall, I find that Ms. Kim's October 11, 2002 accident was work-related and her corresponding left ankle injury arose out of and during the course of her employment with the Navy Exchange.

Because Ms. Kim suffered a broken left ankle injury and on October 11, 2002 she was involved in a work-related accident that could have caused such an injury, Ms. Kim has established through the causation presumption of Section 20 (a), and in the absence of any contrary evidence, that her fractured left ankle is a compensable injury under the Act. Based on the parties' stipulations of fact, I find Ms. Kim is entitled to temporary total disability from October 12, 2002 through November 19, 2002 under Section 8 (b) of the Act for a left ankle injury that occurred on October 11, 2002 at a compensation rate established by the stipulated average weekly wage of \$440.64.

Additionally, since Ms. Kim has suffered a compensable injury, under Section 7 (a) of the Act,⁹ she is also entitled to reasonable and necessary medical benefits associated with her fractured left ankle, including appropriate reimbursement for the expenses she incurred with Dr. Suh, Dr. Sowers, and Dr. Smith.

Issue No. 2 – Nature and Extent of Disability Beyond November 19, 2002

Having determined that Ms. Kim's ankle injury is covered by the Act, and because Ms. Kim first returned to work full time on November 20, 2002 and then several months later reduced her work hours, I turn to consideration of the nature and extent of any additional, associated disability. Specifically, Ms. Kim claims that as of mid-February 2003, she suffered a temporary partial disability.

⁹Under section 7 (a) of the Act, 33 U.S.C. § 907 (a), an employer shall furnish all reasonable and necessary medical care and other attendant care or treatment, hospitalization, and medication for a work-related injury. *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). The term "necessary" relates to whether the medical care is appropriate for the injury. The term "reasonable" addresses the actual cost of treatment. *See Pernell*, 11 BRBS at 539, and 20 C.F.R. § 702.402.

Under the Act, a longshoreman's inability to work due to a work-related injury is addressed in terms of the nature of the disability (permanent or temporary) and extent of the disability (total or partial). In a claim for disability compensation, the claimant has the burden of proving, through the preponderance of the evidence, both the nature and extent of disability. *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56, 59 (1985).

Nature

The nature of a disability may be either temporary or permanent. Although the consequences of a work-related injury may require long term medical treatment, an injured employee reaches maximum medical improvement ("MMI") when her condition has stabilized. *Cherry v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 857 (1978). In other words, the nature of the worker's injured condition becomes permanent and the worker has reached maximum medical improvement when the individual has received the maximum benefit of medical treatment such that her condition will not improve. *Trask*, 17 BRBS at 60. Any disability suffered by a claimant prior to MMI is considered temporary in nature. *Berkstresser v. Washington Metropolitan Area Transit Authority*, 16 BRBS 231 (1984). If a claimant has any residual disability after reaching MMI, then the nature of the disability is permanent.

As an initial step in assessing the nature of Ms. Kim's disability, I must first establish the components of her injury. The term, "injury" is considered to encompass both physical harm and conditions which indicate something has gone wrong within the human frame. *Wheatley v. Adler*, 407 F.2d 307 (D.C. Cir. 1968). If an initial medical condition progresses into complications more serious than the original injury, the additional complications represent compensable injuries. *Andras v. Donovan*, 414 F.2d 241 (5th Cir. 1969). According to the Benefits Review Board ("Board" or "BRB"), credible complaints of subjective symptoms and pain may be sufficient to establish an injury under the Act. See *Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234, 236 (1981), *aff'd sub nom.*, *Sylvester v. Director*, OWCP, 681 F.2d 359 (5th Cir. 1982). Finally, a claimant suffers an injury if her employment aggravates a non-work-related, underlying disease or condition to the extent the claimant suffers incapacitating symptoms. *Preziosi v. Controlled Indus.*, 22 BRBS 468 (1989).

Certainly, as established by Dr. Suh, Dr. Sowers, and Dr. Smith, the principle part of Ms. Kim's October 11, 2002 injury was her fractured left ankle. Significantly, this fracture occurred within the context of Ms. Kim's pre-existing osteoporosis. Following the healing of her ankle bone, the second component of her injury is residual pain. Counsel for the Employer suggested some of the circumstances of Ms. Kim's case might raise questions about the validity of her pain complaints. Notably, Ms. Kim appears to have worked several months without any documented problems with her left ankle after Dr. Smith approved her return to full time work. Ms. Kim reduced her hours in mid-February 2003 without seeing a physician. She did not seek any medical treatment for several months. And, her April 2003 appointment with Dr. Smith seems to coincide with her deposition and pending litigation.

While counsel's concerns are not unwarranted, I found Ms. Kim to be a credible and cooperative witness at the hearing. She presented her answers in a straightforward fashion and did not equivocate. Based on her candid demeanor, I believe the above circumstances

highlighted by the Employer's counsel do not impeach the veracity of her pain complaints. Instead, the events in this case reflect Ms. Kim's determined constitution. Ms. Kim characterized herself as a non-complainer. She relied on Dr. Smith's representation that the pain she was experiencing was normal and would diminish. I find as credible her representation that she persevered at work for several months waiting for the pain to diminish. Finally, when the pain did not diminish, she reduced her hours at the Navy Exchange in mid-February 2003, which seemed to help some. Her presentation is further supported by both her diagnosed osteoporosis, which Dr. Smith indicated might complicate her recovery, and by Dr. Smith's April 2003 concurrence with her work reduction decision. The record contains no indication that Dr. Smith found Ms. Kim's pain representation unreliable or that he was somehow coerced to endorse her decision to reduce her hours. As a result, I find that after November 19, 2002, Ms. Kim returned to work with continuing pain. When the pain level did not diminish by mid-February 2003, the residual pain from the broken ankle injury caused her to reduce her hours of work at the Navy Exchange.

Having determined the components of Ms. Kim's October 11, 2002 injury, I turn to the medical determinations related to that injury. The day after her fall, Ms. Kim presented to Dr. Suh with extensive pain in her left ankle. Dr. Suh observed significant swelling of the left ankle and radiographic imaging established the presence of a fracture. Dr. Suh referred Ms. Kim to Dr. Sowers who also diagnosed a broken left ankle and applied a bandage wrap to reduce swelling as a preliminary treatment step. Dr. Smith then took over and applied a cast, which appears to have remained in place through October 21, 2002. Then, he had Ms. Kim utilize a boot through November 11, 2002. On November 11, 2002, through radiographic evidence and physical examination which showed normal range of motion and reduced swelling, Dr. Smith determined Ms. Kim's fractured ankle was clinically healed. However, due to her pre-existing osteoporosis, Dr. Smith told Ms. Kim to expect continuing, though diminishing, pain. However, her left ankle would never be the same. He indicated that Ms. Kim should stop using the boot and return to work full time in another week. As of November 19, 2002, Dr. Smith approved her return to full duty without restriction. Other than a recommended follow-up check, Dr. Smith prescribed no other treatment.

A couple of weeks later, Dr. Suh followed up with Ms. Kim. Other than pain medication, patient education and a follow-up appointment in two weeks, the doctor prescribed no other medical treatment.

After November 19, 2002, Ms. Kim returned to full time work with continued pain. In mid-February 2003, due to persistent left ankle pain, Ms. Kim reduced her weekly hours with the Navy Exchange from 40 to 20. Between November 26, 2002 and April 8, 2003, Ms. Kim did not receive any medical treatment for her left ankle. She continued to work Sundays at Schofield Barracks. On the two days Ms. Kim no longer worked at the Navy Exchange, she did not work any other job.

On April 8, 2003, Ms. Kim returned to Dr. Smith. After she informed him of her continuing pain and decision to reduce the amount of her work, Dr. Smith agreed with her decision and limited her work to three days a week for a total of 20 hours and advised her to take

pain medication as necessary. At the same time, Dr. Smith did not prescribe any additional medical treatment.

Noticeably absent in this medical summarization is a physician's specific determination that Ms. Kim has reached maximum medical improvement. Such an opinion is the chief means of establishing MMI. *See Drake v. General Dynamics Corp.*, 11 BRBS 288 (1979). However, if the evidence indicates that a condition has persisted for an extended period and appears to be indefinite and not subject to improvement through medical means, a determination of maximum medical improvement may also be made. *Watson v. Gulf Stevedoring Corp.*, 400 F.2d 649, 654 (5th Cir. 1968) *cert. denied*, 394 U.S. 976 (1969).

Based on the circumstances of Ms. Kim's continuing left ankle pain, I find her situation falls into this later category. As on November 11, 2002, Dr. Smith concluded Ms. Kim's fracture was healed although she would experience continued, but diminishing, pain and her ankle would never return to normal. Ms. Kim's subsequent experience with continuing pain has proven Dr. Smith partially correct. By the time she returned to Dr. Smith in April 2003, Ms. Kim had struggled with persistent left ankle pain for several months. Other than concurring with her reduced work load, and recommending pain medication as needed, Dr. Smith prescribed no other medical treatment. Based on his familiarity with Ms. Kim's fractured left ankle, and considering the presentation Ms. Kim made in April 2003, I conclude by Dr. Smith's medical inaction after the April 2003 visit that he continued to believe his earlier determination that Ms. Kim had clinically healed in regards to the left ankle fracture by the time of her return to full time employment as of November 20, 2002. Due to Dr. Smith's inaction following the April 2003 visit and the absence of any medical evidence that Ms. Kim's left ankle pain will improve with subsequent medical treatment, I conclude that Ms. Kim reached maximum medical improvement on November 19, 2002. Accordingly, as of that date, the nature of her impairment was permanent.

Extent

The question of the extent of a disability, total or partial, is an economic as well as a medical concept. *Rinaldi v. General Dynamics Corp.*, 25 BRBS 128, 131 (1991). The Act defines disability as an incapacity, due to an injury, to earn wages which the employee was receiving at the time of injury in the same or other employment. *McBride v. Eastman Kodak Co.*, 844 F.2d 797 (D.C. Cir. 1988). Total disability occurs if a claimant is not able to return to her pre-injury, regular, full-time employment. *Del Vacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190, 194 (1984). A disability compensation award requires a causal connection between the claimant's physical injury and her inability to obtain work. The claimant must show an economic loss coupled with a physical and/or psychological impairment. *Sproull v. Stevedoring Servs. of America*, 25 BRBS 100, 110 (1991). Under this standard, a claimant may be found to have either suffered no loss, a partial loss, or a total loss of wage-earning capacity. Additionally, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with, or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. *Strachen Shipping v. Nash*, 782 F.2d 531 (5th Cir. 1986).

Ms. Kim has only reduced her hours at the Navy Exchange; she still continues to work part time at the barber shop. As a result, the extent of her left ankle disability is partial and not total.

Permanent Partial Disability

Because I have determined Ms. Kim has a permanent partial disability, the method and amount of the actual compensation for her injury is established by Section 8 (c) of the Act, 33 U.S.C. § 908 (c). In the first portion of this section, Sections 8 (c) (1) to (c) (17), compensation for numerous types of injuries, such as loss of a leg, is established by a specific schedule of awards. For other injuries not listed in this schedule, such as a back injury, Section 8 (c) (21) bases permanent partial disability compensation on two-thirds the difference between the average weekly wage of the employee and the employee's wage-earning capacity thereafter in the same or another employment.

Although the first 17 subparagraphs address the total loss of a specified limb, an eye or hearing, Section 8 (c) (19) provides that partial loss of use of a limb is compensated as a proportional loss of use of the limb. The Benefit Review Board and the courts apply the proportionality principle set out by Section 8 (c) (19) for a partial loss of use by indicating the compensation runs for the proportionate number of weeks attributable to the loss of the member at the full compensation rate of two-thirds of the average weekly wage. *Nash v. Strachan Shipping Co.*, 15 BRBS 386 (1983), *aff'd in relevant part but rev'd on other grounds*, 760 F.2d 569 (5th Cir. 1985), *aff'd on recon en banc*, 782 F. 2d 513 (1986).

For an injury listed on the schedule, the injured employee is automatically entitled to a certain level of compensation as a result of her injury and no proof of actual wage-earning capacity is required to receive the specified compensation. *See Travelers Ins. Co.*, 225 F.2d 137 (2d Cir.) *cert. denied* 350 U.S. 913 (1955). As a result, the adjudication of a permanent partial disability under the schedule is based solely on physical factors. *Bachich v. Seatrain Terminals*, 9 BRBS 184, 187 (1978). In determining the appropriate degree (or proportionate) loss of use in a permanent disability compensation case, the Benefits Review Board in *Peterson v. Washington Metro. Area Transit Auth.* 13 BRBS 891, 897 (1981), stated an administrative law judge "is not bound by any particular formula when determining the degree of permanent partial disability and that it is within his discretion to assess a degree of disability different from the ratings found by the physicians if that degree is reasonable." Finally, an ankle injury is adjudicated under Sections 8 (c) (4) and (c) (19) of the Act as partial loss of use of the foot. *See Geisler v. Continental Grain Co.*, 20 BRBS 35, 37 (1987).

Unfortunately, due to the dearth of detailed medical evidence in this case, I am unable to ascertain the percentage of impairment Ms. Kim certainly suffers due to her work-related left ankle injury and residual left ankle pain. Since Ms. Kim bears the burden of proof in establishing the degree of impairment in terms of partial loss of use of her left foot, her

compensation claim for an additional disability beyond November 19, 2002 which consists of a permanent partial disability must be denied at this time.¹⁰

ATTORNEY FEE

Section 28 of the Act, 33 U.S.C. § 928, permits the recoupment of a claimant's attorney's fees and costs in the event of a "successful prosecution."¹¹ Since I have determined issues in favor of Ms. Kim, her attorney, Mr. Friedheim, is entitled to submit a petition to recoup his fees and costs associated with his professional work before the Office of Administrative Law Judges. Mr. Friedheim has thirty days from receipt of this decision and order to file an application for attorney fees and costs as specified in 20 C.F.R. § 702.132 (a). The other party, and its counsel, Mr. Brooks, have ten days from receipt of such fee application to file an objection to the request.

ORDER

Based on my findings of fact, conclusions of law, and the entire record, I issue the following order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

1. Ms. Kim's claim for TEMPORARY, TOTAL DISABILITY compensation is **GRANTED**: The Employer, NAVY EXCHANGE SERVICE COMMAND **SHALL PAY** the Claimant, MS. CONNIE KIM, compensation for TEMPORARY, TOTAL DISABILITY, for a left ankle injury caused by an October 11, 2002 accident, from October 12, 2002 through November 19, 2002, based on an average weekly wage of \$440.64, such compensation to be computed in accordance with Section 8 (b) of the Act, 33 U.S.C. § 908 (b).

2. The Employer, NAVY EXCHANGE SERVICE COMMAND **SHALL FURNISH** the Claimant, MS. CONNIE KIM, such reasonable, appropriate, and necessary **MEDICAL CARE AND TREATMENT** as her left ankle injury caused by an October 11, 2002 accident may require in accordance with Section 7 (a) of the Act, 33 U.S.C. § 907 (a).

¹⁰Through the provisions of Section 22, Ms. Kim has an opportunity within one year of the final rejection of her disability compensation claim to seek a modification of the result through evidence of a mistake of fact or a change in condition.

¹¹Since Ms. Kim was only partially successful, both parties must address the application of the analysis set out by the U.S. Supreme Court, in *Hensley v. Eckerhart*, 461 U.S. 424 (1983), made applicable to longshoreman claims in *George Hyman Const. Co. v. Brooks*, 963 F.2d 1532 (D.C. Cir. 1992).

3. Ms. Kim's claim for PERMANENT PARTIAL DISABLIITY compensation is **DENIED.**

SO ORDERED:

A
RICHARD T. STANSELL-GAMM
Administrative Law Judge

Date Signed: July 22, 2004
Washington, D.C.